

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

CATHIE KONYEN.

Plaintiff,

v.

LOWES HOME CENTERS, LLC,

Defendant.

Case No. 3:22-CV-00538-MMD-CLB

**ORDER RE: MOTION REGARDING
DISCOVERY DISPUTE, MOTION TO
QUASH, AND MOTION/OBJECTION TO
PLAINTIFF'S THIRD AMENDED
SUBPOENA DUCES TECUM**

[ECF Nos. 30, 31, 36]

10 Before the Court are several motions relating to disputes that have arisen during
11 rebuttal discovery in this action. First, is Plaintiff Cathie Konyen's ("Konyen") motion
12 regarding discovery dispute. (ECF No. 30.) Defendant Lowes Home Centers, LLC
13 ("Lowes"), responded to the motion. (ECF No. 34.) Second is Interested Party Reno
14 Orthopedic Center's ("ROC") motion to quash. (ECF No. 31.) Konyen responded, (ECF
15 No. 32), and ROC replied, (ECF No. 35). Finally, is ROC's motion/objection to Konyen's
16 third amended *subpoena duces tecum*. (ECF No. 36.) Konyen responded, (ECF No. 39),
17 and ROC replied, (ECF No. 42.) The Court will address each motion in turn.¹

18 | I. BACKGROUND

19 The instant case arises out of allegations of discrimination in violation of the
20 Americans with Disabilities Act and Nevada Revised Statutes §§ 613.330, 613.340, as
21 well as a claim of breach of an employment contract or legally enforceable promise, in
22 relation to Konyen's employment by Lowes. (ECF No. 1.)

23 Konyen's asserts disability discrimination and retaliation claims against Lowes, in
24 connection with Lowes' withdrawal of disability accommodations to her. (*Id.*) Konyen
25 alleges the adverse employer actions taken against her consisted of Lowes' failure to
26 accommodate her disabilities, failure to engage in the mandated interactive process to

¹ The Court finds this matter properly resolved without oral argument. See Local Rule 78-1.

1 keep her in the same position for which she was the leading salesperson, retaliating
 2 against her, and firing her (whether constructive discharge or direct firing), on the pretext
 3 of asking her to put in her “notice of resignation,” in order for her to obtain interim pay
 4 while she waited to receive short-term disability benefits, which Lowes forced her to take.
 5 (*Id.*)

6 Discovery in this case has been extended numerous times, (See ECF Nos. 13, 21,
 7 23, 26), with the most recent extension occurring on March 6, 2024, (ECF No. 28). On
 8 February 16, 2024, during the deposition of Konyen’s treating ROC provider, Dr. Bruce
 9 Witmer, the validity of two ADA Accommodations Substantiation Forms (collectively
 10 referred to as “ADA Forms”—which form the basis of Konyen’s ADA claims—was raised
 11 for the first time. (ECF No. 27.) Thus, the most recent extension of discovery was for the
 12 limited purpose of conducting rebuttal discovery regarding the validity of ROC medical
 13 records, the validity, including the possible forgery, of two ADA Forms completed in April
 14 2019 and purported to be signed by Dr. Witmer, and for handwriting samples and retained
 15 expert analysis to determine authorship of the two suspected fraudulent ADA forms. (See
 16 *id.*)

17 On April 5, 2024, in accordance with this Court’s discovery dispute process,
 18 Konyen filed a motion regarding discovery dispute regarding Lowes’ notice of intent to
 19 issue a records subpoena on ROC’s former employee, Courtney Scottish (“Scottish”).
 20 (ECF No. 30.) Scottish is a witness identified by Konyen as having certain information
 21 concerning how ROC conducted its business operations from October 2019 through June
 22 2021. (*Id.*)

23 On April 8, 2024, Interested Party ROC filed an objection to and motion to quash
 24 and/or modify amended subpoena-civil deposition *duces tecum* served by Konyen on
 25 ROC. (ECF No. 31.) Specifically, the subpoena commands an in-person deposition of a
 26 representative of ROC pursuant to Fed. R. Civ. P. 30(b)(6) on a variety of topics pertaining
 27 to the procedure for receiving, completing, signing, and returning a variety of forms under
 28 the ADA, as well as a request for documents. (*Id.*) The objection and motion are made on

1 the grounds that the subpoena imposes undue burden and expense on ROC. (*Id.*) On
 2 April 22, 2024, Interested Party ROC filed an objection to Konyen's third amended
 3 subpoena-civil deposition duces tecum served by Konyen on ROC. (ECF No. 36.) This
 4 objection is based on the same grounds as the first motion and was filed in response to
 5 Konyen issuing another subpoena seeking the same information, documents, and
 6 deposition of a ROC employee on a variety of subjects. (*Id.*)

7 **II. LEGAL STANDARD**

8 “[B]road discretion is vested in the trial court to permit or deny discovery.” *Hallett*
 9 *v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Crawford-El v. Britton*, 523 U.S.
 10 574, 598 (1998). Parties are entitled to discover non-privileged information that is relevant
 11 to a party's claim or defense and is proportional to the needs of the case, including
 12 consideration of the importance of the issues at stake in the action, the parties' relative
 13 access to relevant information, the parties' resources, the importance of the discovery in
 14 resolving the issues, and whether the burden or expense of the proposed discovery
 15 outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1); *see also ATS Prods., Inc. v.*
 16 *Champion Fiberglass, Inc.*, 309 F.R.D. 527, 530 (N.D. Cal. 2015) (the scope of third-party
 17 discovery is subject to the same limitations). The discovery process should be
 18 cooperative and largely unsupervised by the court. *Sali v. Corona Reg. Med. Ctr.*, 884
 19 F.3d 1218, 1219 (9th Cir. 2018).

20 **III. DISCUSSION**

21 **A. Konyen's Motion Regarding Discovery Dispute**

22 On April 5, 2024, in accordance with this Court's discovery dispute process,
 23 Konyen filed a motion regarding discovery dispute regarding Lowes' notice of intent to
 24 issue a records subpoena on ROC's former employee, Courtney Scottish (“Scottish”).
 25 (ECF No. 30.) Lowes' subpoena asks for “any and all records in [ROC's] control pertaining
 26 to [] Scottish.” (ECF No. 30-2.) Scottish is a witness identified by Konyen as having
 27 certain information concerning how ROC conducted its business operations from October
 28 2019 through June 2021. (ECF No. 30.)

1 Generally, a party does not have standing to bring a motion to quash a subpoena
 2 that is directed to a nonparty, unless the party is asserting a privilege or some other
 3 ground that establishes standing. See *United States v. Tomison*, 969 F. Supp. 587, 596
 4 (E.D. Cal. 1997) (“A party only has standing to move to quash the subpoena issued to
 5 another when the subpoena infringes upon the movant's legitimate interests ...
 6 Accordingly the government lacks standing to raise the exclusive grounds for quashing
 7 the subpoena, since it lacks the sine qua non of standing, an injury in fact relative to those
 8 grounds.”); *California Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638,
 9 643 (E.D. Cal. 2014) (“The Ninth Circuit has yet to address the question of whether a
 10 party has standing to bring a motion to quash since usually only the subpoenaed non-
 11 party may move to quash. The general rule, however, is that a party has no standing to
 12 quash a subpoena served upon a third party, except as to claims of privilege relating to
 13 the documents being sought.”).

14 As recently explained:

15 Under Federal Rule of Civil Procedure 45(a)(1)(C), a party may subpoena
 16 a nonparty to produce documents, electronically stored information, and
 17 tangible things. The court “must” quash or modify a subpoena if it “requires
 18 disclosure of privileged or other protected matter, if no exception or waiver
 19 applies.” Fed. R. Civ. P. 45(d)(3)(A)(iii). The Ninth Circuit has “yet to
 20 address the question of whether a party has standing to bring a motion to
 21 quash since usually only the subpoenaed non-party may move to quash.
 22 The general rule, however, is that a party has no standing to quash a
 23 subpoena served upon a third party, except as to claims of privilege relating
 24 to the documents being sought.” *California Sportfishing Prot. All. v. Chico*
Scrap Metal, Inc., 299 F.R.D. 638, 643 (E.D. Cal. 2014) (citing *Windsor v.*
Martindale, 175 F.R.D. 665, 668 (D. Colo. 1997)); *see also Peccia v. Dep't*
of Corr. & Rehab., No. 2:18-cv-3049 JAM AC, 2020 WL 2556751, at *1 (E.D.
 25 Cal. May 20, 2020) (citing *California Sportfishing*, 175 F.R.D. at 643);
Robertson v. Catholic Cnty. Servs. of W. Washington, No. C19-1618 RSM,
 2020 WL 1819842, at *5 (W.D. Wash. Apr. 10, 2020) (same). Under this
 26 general rule, plaintiff lacks standing to object to the subpoena on grounds
 27 of relevance or undue burden. *Wells Fargo & Co. v. ABD Ins.*, No. C 12-
 03856 PJH DMR, 2012 WL 6115612, at *2 (N.D. Cal. Dec. 10, 2012). A
 28 party cannot seek to quash a Rule 45 subpoena except to the extent that it
 has “a personal right or privilege in the information sought to be disclosed.”
Freed v. Home Depot U.S.A., Inc., No. 18cv359-BAS (LL), 2019 WL
 582346, at *2 (S.D. Cal. Feb. 13, 2019) (quoting *Chevron Corp. v. Donziger*,

1 2013 WL 4536808, at *4 (N.D. Cal. Aug. 22, 2013)).
2 *Krenitsky v. Kirsch*, No. 218CV0690WBSDBP, 2020 WL 5017270, at *1 (E.D. Cal. Aug.
3 25, 2020). Noted in *Krenitsky*, “[i]n contrast to a motion to quash, a party has standing to
4 seek a protective order to limit discovery from a third party.” *Id.* at *1 n.1 (citing *Auto-*
5 *Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 231 F.R.D. 426, 429 (M.D. Fla. 2005)).

6 Konyen asserts she has standing because she “has a legitimate interest in
7 receiving the protections of the Court’s Order limiting discovery to the rebuttal issue.”
8 (ECF No. 30 at 2.) Lowes argues that Konyen does not have standing to quash the
9 document request because Konyen cannot allege any privilege or vested interest in the
10 responsive documents. (ECF No. 34.)

11 The Court agrees with Lowes that Konyen does not have standing to quash the
12 subpoena of records on third-party witness Scrottish. Specifically, Konyen has not
13 asserted any claims of privilege with respect to the requested documents. Further, it does
14 not appear Konyen would be able to assert any privilege, as the requested records consist
15 of Scrottish's employment records during her employment with ROC, which in no way
16 relate to Konyen. For this reason alone, the Court finds that Konyen's motion regarding
17 discovery dispute, (ECF No. 30), is denied.²

18 B. ROC's Objection/Motion to Quash and/or Modify Subpoena

19 ROC objects to the Amended Subpoena Duces Tecum issued by Konyen on
20 March 27, 2024 and moves to quash and/or modify the Subpoena on the grounds that it
21 imposes undue burden and expense on ROC. (ECF No. 31.) Specifically, the Amended
22 Subpoena relates to a Rule 30(b)(6) deposition of a representative of non-party ROC on
23 a variety of topics pertaining to the procedure for receiving, completing, signing and

25 ² Standing aside, the Court is confused by Konyen's argument that the subpoena at
26 issue is outside the scope of rebuttal discovery. The Court's understanding of the purpose
27 of rebuttal discovery was to ascertain the validity of ROC medical records, and the validity,
28 including the possible forgery, of two ADA Forms completed in April 2019. Konyen herself
disclosed the Declaration of Scottish, which discusses ROC's practices and procedures
for record keeping. Konyen's attempt to now limit Lowes' ability to conduct its own
discovery regarding Scottish's credibility and the veracity of her statements is frankly
troubling to the Court.

1 returning a variety of ADA forms. On April 22, 2024, ROC filed an objection to Konyen's
 2 Third Amended Subpoena Duces Tecum served by Konyen on ROC. (ECF No. 36.) This
 3 objection is based on the same grounds as the first motion and was filed in response to
 4 Konyen re-issuing the same subpoena, seeking the same information, documents, and
 5 deposition of a ROC employee on a variety of subjects, but with a later deposition date.
 6 (*Id.*)

7 First, the Court must address Konyen's assertion that ROC must comply with the
 8 subpoenas despite the filing of the objection and motion to quash. When a nonparty is
 9 served with a subpoena, it has three options: it may (1) comply with the subpoena, (2)
 10 serve an objection on the requesting party in accordance with Rule 45(d)(2)(B), or (3)
 11 move to quash or modify the subpoena in accordance with Rule 45(d)(3). See *Genx*
 12 *Processors Mauritius Ltd. v. Jackson*, No. 2:14-cv-019830-APG-PAL, 2018 WL 5777485,
 13 at *9 (D. Nev., Nov. 2, 2018) (citing *In re Plise*, 506 B.R. 870, 878 (B.A.P. 9th Cir. 2014).³
 14 Timely written objections to a subpoena in accordance with Rule 45(d) qualify as an
 15 "adequate excuse" for noncompliance. *Id.* (citing *DeGeer v. Gillis*, 755 F. Supp. 2d 909,
 16 930 (N.D. Ill. 2010); *In re Exxon Valdez*, 142 F.R.D. at 385). When a nonparty raises
 17 timely objections to the subpoenas, the nonparty is not required to produce documents,
 18 or even search for them, until the propounding party obtains an order directing
 19 compliance. *Genx Processors*, 2018 WL 5777485, at *9 (citing *Pennwalt Corp. v. Durand-*
 20 *Wayland, Inc.*, 708 F.2d 492, 494 & n.5 (9th Cir. 1983); *In re Plise*, 506 B.R. at 878;
 21 *DeGeer*, 755 F. Supp. 2d at 930.) Thus, the Court explicitly finds that once ROC filed its
 22 objection and/or motion to quash, it was no longer obligated to comply with the subpoena.

23 Moving on to ROC's objection and motion, ROC objects to the subpoena pursuant
 24 to Fed. R. Civ. P. 45(d)(2)(B). Additionally, ROC argues the subpoena should be either
 25 quashed or modified pursuant to Fed. R. Civ. P. 45(d)(3)(iv), as the subpoena subjects

27 ³ *Genx Processors* refers to the provisions of Fed. R. Civ. P. 45(c), however, the
 28 2013 Amendment to the Rules notes that subdivision (d) now contains the provisions
 formerly in subdivision (c). See Fed. R. Civ. P. 45, Advisory Committee Note, 2013
 Amendment.

1 ROC to undue burden.

2 Rule 45 governs the issuance of subpoenas requiring non-parties to produce
 3 designated documents. See Fed. R. Civ. P. 45(a)(1)(A)(iii). A court must grant a timely
 4 motion to quash or modify a subpoena that fails to allow reasonable time to comply,
 5 requires a person to comply beyond the geographical limits, requires disclosure of
 6 privileged or other protected matter, if no exception or waiver applies, or subjects a person
 7 to undue burden. See Fed. R. Civ. P. 45(d)(3)(A). The movant seeking to quash a
 8 subpoena bears the burden of persuasion. *Green v. Baca*, 226 F.R.D. 624, 653 (C.D. Cal.
 9 2005). Whether a subpoena is unduly burdensome depends on the facts of each specific
 10 case. *Id.* Additionally, “courts have incorporated relevance as a factor when determining
 11 motions to quash a subpoena, particularly when considering whether there is an undue
 12 burden.” *Bird v. PSC Holdings I, LLC*, 2013 WL 12108107, at *1 (S. D. Cal. Nov. 20, 2013)
 13 (internal quotations and citation omitted).

14 ROC specifically objects to the portions of the subpoena that request: (1) a Rule
 15 30(b)(6) deposition on nine topics related to the procedure for completing ADA forms; (2)
 16 medical records of other ROC patients that contain handwriting, signatures, and initials
 17 of several providers and employees of ROC; (3) a list of all ROC email addresses
 18 historically assigned to Dr. Witmer; and (4) a schedule of all doctors, nurse practitioners,
 19 and medical assistants who “physically worked” at ROC on April 16, 2019 and April 30,
 20 2019. (ECF No. 31.)

21 ROC’s counsel represents that during the meet-and-confer process, Konyen’s
 22 counsel conceded that ROC’s compliance with the subpoena would be expensive,
 23 “hugely disruptive” and a burden for ROC. (ECF No. 31-4 at 2.) Based on this concession
 24 alone, the Court finds that ROC has carried its burden of demonstrating that the
 25 subpoenas are unduly burdensome.

26 Concession aside, Konyen has not shown how this particular discovery is relevant
 27 to the very limited rebuttal discovery that the Court has allowed. The limited purpose of
 28 conducting rebuttal discovery is regarding the validity of ROC medical records, the

1 validity, including the possible forgery, of two ADA Forms completed in April 2019 and
2 purported to be signed by Dr. Witmer, and for handwriting samples and retained expert
3 analysis to determine authorship of the two suspected fraudulent ADA forms. (ECF No.
4 27.) It is unclear, for example, how obtaining other patient's records from ROC would
5 provide any relevant information as to the validity of Konyen's ADA forms. Further, ROC's
6 counsel has proposed providing affidavits of its existing employees stating that they did
7 not complete the subject ADA form and providing their signatures within such an affidavit,
8 which ROC asserts would be considerably less disruptive and less expensive than
9 complying with the subpoena. (ECF No. 31 at 5.) The Court agrees. Konyen's subpoena
10 as drafted is unduly burdensome and does not appear necessary in light of the available
11 alternative proposed by ROC to acquire the evidence.

12 Accordingly, the Court sustains ROC's objection to the subpoenas. The subpoenas
13 are modified, as proposed by ROC, to allow only for affidavits of existing employees,
14 including Dr. Christensen, related to whether or not they completed the subject ADA form
15 and providing their signatures within such affidavits. (See ECF No. 31 at 5.) ROC shall
16 have 14 days from the date of this order to provide such affidavits to Konyen.

17 **IV. CONCLUSION**

18 Accordingly, **IT IS ORDERED** that the motion regarding discovery dispute, (ECF
19 No. 30), is **DENIED**.

20 **IT IS FURTHER ORDERED** that the objections/motions to Konyen's amended
21 subpoena, (ECF Nos. 31, 36), are **SUSTAINED**, and the subpoenas are **MODIFIED**,
22 consistent with the above.

23 **IT IS FURTHER ORDERED** that ROC must provide Konyen affidavits, as outlined
24 above, within **14 days** of this Order.

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1 **IT IS FURTHER ORDERED** that all other deadlines as set out in the discovery
2 plan and scheduling order, (ECF No. 28), remain in effect.

3 IT IS SO ORDERED.

4 | DATED: May 3, 2024



UNITED STATES MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE